UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PROSPECT STREET ENERGY, LLC, and
PROSPECT STREET VENTURES I, LLC,

Petitioners,

v.

DART ENERGY CORPORATION;
EVEREST ENERGY MANAGEMENT,
LLC; ENERGY GROUP MANAGEMENT,
LLC; EE GROUP, LLC; and EVEREST
ENERGY GROUP, LLC,

Respondents.

Hon. Gershwin A. Drain
Mag. Judge Mona K. Majzoub
Case No. 16-cv-11376

PETITIONERS' RESPONSE IN OPPOSITION TO DART ENERGY CORPORATION'S MOTION TO DISMISS AND FOR SANCTIONS

NOW COME Petitioners, PROSPECT STREET ENERGY, LLC and PROSPECT STREET VENTURES I, LLC (collectively "Prospect"), by and through their attorneys, ABBOTT NICHOLSON, P.C., and hereby respond in opposition to Dart Energy Corporation's Motion to Dismiss and for Sanctions.

In support of this response, Prospect relies upon the brief in support filed contemporaneously herewith and all exhibits attached thereto.

WHEREFORE, Prospect respectfully requests that the Court deny Dart Energy Corporation's Motion to Dismiss and for Sanctions, award Prospect its costs and attorneys' fees so wrongfully incurred in having to respond to this

Motion, and grant Prospect any such further relief deemed equitable and just under the circumstances.

Dated: May 20, 2016

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITIONERS' RESPONSE IN OPPOSITION TO DART ENERGY CORPORATION'S MOTION TO DISMISS AND FOR SANCTIONS

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I. QUESTIONS PRESENTED

1. Should the Court dismiss or stay the Petition pursuant to the "first-to-file doctrine," where both actions are now before the same federal district court judge?

Petitioners' Answer: NO

2. Should the Court sanction Petitioners for making a good faith administrative request for judicial reassignment in a letter addressed to the Court and copying Respondents?

Petitioners' Answer: NO

II. CONTROLLING OR MOST APPROPRIATE AUTHORITY

Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.,
511 F.3d 535 (6th Cir. 2007) 8–9

First Bank of Marietta v. Hartford Underwriters Insurance Co.,
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9 U.S.C. § 9 .... 3, 4, 7

Fed. R. Civ. P. 11(c)(2) 11

III. PRELIMINARY STATEMENT

Dart's Motion to Dismiss and for Sanctions (Doc. No. 30) is yet another effort of Respondents to disrupt the summary proceeding to confirm Prospect's arbitral award contemplated by the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 9. Dart's motion to dismiss is premised upon the supposed grounds of the first-to-file doctrine. But this theory does not support dismissal in this case: the first-to-file doctrine relates to federal cases in sister courts and there is no related pending action in any other *federal* court.

Dart's motion for sanctions is premised upon a letter sent to the Court and all parties on April 27, 2016 regarding administrative matters. (Letter, **Exhibit A**.) But Dart fails to show that constituted misconduct—much less egregious and bad faith misconduct required to warrant the extraordinary award of sanctions.

For the reasons that follow, Prospect submits that this Court should deny Dart's Motion to Dismiss and for Sanctions.

IV. FACTUAL BACKGROUND

On April 15, 2016, Prospect Street Energy, LLC ("PSE") and Prospect Street Ventures I, LLC ("PSV", and collectively with PSE, "Prospect") filed a Petition to Confirm an Arbitration Award (Doc. No. 1) (the "Petition") against Energy Group Management, LLC ("EGM"), Everest Energy Management, LLC ("EEM"), and EE Group, LLC a/k/a/ Everest Energy Group, LLC ("EEG", and collectively with EGM and EEM, "Everest") and Dart Energy Corporation ("Dart", and collectively with Everest, "Respondents"). The Petition seeks confirmation of an arbitral award issued April 7, 2016 (the "Award") by a duly appointed three-member arbitral tribunal under the auspices of the American Arbitration Association, chaired by the Hon. Stephen Larson (ret.), a former United States District Court judge. The Award, rendered after a multi-year arbitration proceeding, adjudicated — and upheld — Prospect's claims arising out of Everest's and Dart's knowing breach and interference with a joint venture agreement between Prospect and Everest to work together exclusively on a 50/50 basis to acquire a gas storage facility in Marysville, Michigan.

On April 11, 2016, the first business day after the Award was delivered to the parties, Everest hastily commenced an action in St. Clair County Circuit Court, Michigan against Prospect (Case No. 16-000838-CB) (the "Everest Action"), seeking to vacate the Award on the single ground of arbitrator partiality. Two days later, on April 13, 2016, Everest filed a First Amended Complaint adding two additional proposed grounds for vacatur. On April 14, 2016, Dart filed a motion to intervene in the Everest Action.

On April 15, 2016, pursuant to its statutory right under Section 9 of the FAA, 9 U.S.C. § 9, Prospect filed the Petition in this action, seeking confirmation of the Award. Prospect advised the Court of the Everest Action, identifying it as a "companion case" arising out of the same facts as this action on the Civil Cover Sheet filed with the Notice of Related Cases. (*See* Doc. Nos. 1, 10.)

Also on April 15, 2016, pursuant to its statutory rights under 28 U.S.C. § 1441, Prospect filed a motion to remove the Everest Action to this Court. Again, in its removal papers, Prospect identified this action as a companion case arising out of the same facts. (*See* 16-cv-11377; Doc. Nos. 1, 5.)

On April 27, 2016, to ensure that all proceedings relating to confirmation and vacatur of the Award were coordinated before a single judge, Prospect filed a letter with the Court requesting coordination of companion cases under Local Rule 83.11(b). On April 28, 2016, the Court assigned the companion cases to this Court.

On April 29, 2016, Everest filed a Motion to Dismiss or Stay, which this Court calendared for a hearing on June 27, 2016. (*See* Doc. No. 19.) That same day, Dart filed this separate Motion to Dismiss and for Sanctions, (*see* Doc. No. 30), and Prospect filed its Motion for Summary Judgment to confirm the arbitral award under the FAA. On May 2, 2016, this Court calendared hearing on Dart's Motion to Dismiss and Prospect's Motion to Confirm on the same day as Everest's Motion to Dismiss – June 27, 2016. (*See* Doc. No. 33.)

V. ARGUMENT

A. THE FIRST-TO-FILE DOCTRINE IS INAPPLICABLE

Dart misguidedly invokes the so-called first-to-file doctrine to argue that this confirmation action should be dismissed in favor of the Everest Action which Prospect removed to this Court. The argument, which can only have been advanced for dilatory reasons, makes no sense and, not surprisingly, lacks any legal support whatsoever. The first-to-file doctrine is a "well-established doctrine that encourages comity *among federal courts of equal rank*." *AmSouth Bank v. Dale*, 386 F.3d 763, 791 n.8 (6th Cir. 2004) (emphasis added). Dart cites the exact same formulation of the rule. *See* Motion to Dismiss and for Sanctions at iv (quoting *Zide Sport Shop of Ohio, Inc. v. Ed Tobergte Assocs.*, Inc., 16 F. App'x 433, 437 (6th Cir. 2001), **Exhibit F**). Indeed, Dart's citation to *Zide Sport Shop of Ohio* further emphasizes that the doctrine applies to actions "filed in *two different district courts*." *Id.* (citing *Zide Sport Shop of Ohio*, 16 F. App'x at 437) (emphasis added). Ostensibly pursuant to this inapposite doctrine, Dart writes:

> Prospect's letter simply refuses to acknowledge that Everest's complaint was the first-filed complaint and that Prospect should have filed a counterclaim instead of filing an additional complaint. . . . . Now that the two actions have been assigned to the same judge, there is no reason to have a second federal proceeding pending. This action should be dismissed and the case should proceed under the First-Filed Action.

(Motion to Dismiss and for Sanctions at 7–8.)

Just like Everest, Dart cites no authority for its contention that the first-to-file doctrine can preclude a party to a removable start court action from also commencing a federal action. Courts have explicitly rejected such contentions. *See, e.g.*, *Smart v. Sunshine Potato Flakes, L.L.C.*, 307 F.3d 684, 687 (8th Cir. 2002) ("[T]he Supreme Court has rejected the contention 'that the decision of a party to spurn removal and bring a separate suit in federal court invariably warrants the stay or dismissal of the suit . . . .'" (citing *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 290 (1988)). Nor does Dart cite any authority requiring that removal precede Prospect's filing of its own petition under the FAA. The *only* limit on the timing of these actions are the deadlines set forth in 28 U.S.C. § 1441 and 9 U.S.C. § 9. As shown in Prospect's Opposition to Dart's Motion to Intervene as of Right and for an Order of Remand, Dart's suggestion that Prospect "improperly cut off Dart's right to intervene" to "create a fiction that the parties are of diverse states," is baseless. (*See* 16-cv-11377; Doc. No. 29 at 8.) As the *sole* defendant in a case by Michigan plaintiffs, Prospect, a non-resident of Michigan, had a statutory right to remove the case when it did.

The first-to-file doctrine does not (and cannot) apply here, where two actions are pending in the same district court *and* before the same district court judge. In *Word Music, LLC v. Priddis Music, Inc.*, the Middle District of Tennessee specifically held that the question of first-to-file became moot once the actions at issue were reassigned to the same judge. No. 3:07CV0502, 2007 WL 3231835, at *1 (M.D. Tenn. Oct. 30, 2007) ("Although all the parties devoted the better part of their briefs to the applicability of the first-to-file rule, that issue is no longer relevant. . . . [T]he California Action was transferred from the Northern District of California to the Middle District of Tennessee and assigned to the undersigned as a related case, thereby rendering moot the 'first-to-file' argument."), **Exhibit B**. And in *Henderson v. JPMorgan Chase Bank*, the court noted that "courts have regularly declined to apply the first-to-file rule in those situations where the two actions at issue are pending before the same judge." No. CV 11-3428 PSG PLAX, 2011 WL 4056004, at *2 (C.D. Cal. Sept. 13, 2011) (gathering cases), **Exhibit C**.

To the extent Dart is invoking the doctrine to establish priority of the (now removed) Everest Action, it is equally misguided. The first-to-file doctrine simply does not apply as between parallel federal and state actions, and thus cannot dictate priority as between this Court and St. Clair County Circuit Court. *See AmSouth Bank*, 386 F.3d at 791 n.8 ("[Application of the first-to-file doctrine was improper because] the first-filed rule only applies to two cases filed in separate federal courts, and the Mississippi litigation was filed in state court.") (citations omitted).[1]

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[1] *See also Smart*, 307 F.3d at 687 (declining to apply first-to-file doctrine between federal and state actions and writing "[t]he first-filed factor is often dominant in determining which *federal* court should proceed when the parties to an arbitration award have filed cross motions to vacate and confirm the award

Indeed, in *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, the Sixth Circuit reversed the district court for applying the "discretionary" doctrine, holding "reliance on the first-to-file doctrine to be misplaced" in that case when the allegedly first-filed case was filed in state court before being removed to federal court. 511 F.3d 535, 551 (6th Cir. 2007). The court continued: "By filing in Ohio courts, Defendants were attempting to forum shop as well as preempt resolution of the parties' dispute by the proper forum. Thus, the Ohio action was not entitled to any deference under the first-to-file rule."[2] *Id.* at 552.

Dart cites *Innovation Ventures, L.L.C. v. Custom Nutrition Labs., L.L.C.* for the proposition that the "date the removed action was filed in state court is the controlling date to determine which of two actions has priority. The date of removal is immaterial." (Motion to Dismiss and for Sanctions at iv (citing 534 F. Supp. 2d 754, 756 (E.D. Mich. 2008)).) Like Everest, Dart conveniently presents

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in *different district courts*") (second emphasis added); *Healthcare Capital, LLC v. Healthmed, Inc.*, 213 F. Supp. 2d 850, 856 (S.D. Ohio 2002) ("[T]he actions similar to the matter *sub judice* were previously filed in state court, not federal court. Thus, the first-to-file doctrine is inapplicable in this case.").

2 Similarly, in *Zide Sport Shop of Ohio*, the Sixth Circuit stated that "[d]istrict courts have the discretion to dispense with the first-to-file rule where equity so demands" and referred to the first-to-file plaintiff as engaging in "procedural fencing," 16 F. App'x at 437–38, which is exactly what Everest did by rushing into state court knowing Prospect, a non-resident defendant, would avail itself of its right to a federal forum to seek to confirm its award under the FAA.

this citation out of context. In *Innovation Ventures*, the court applied the first-to-file doctrine between actions brought in the Eastern District of Michigan and in Texas state court and then *removed to the Northern District of Texas*. *Innovation Ventures*, 534 F. Supp. 2d at 755. *Innovation Ventures* bears no relation to this case, where the state filing was removed and pending in the *same* federal district court — and indeed, before the same federal judge — as the federal filing. Dart fails to cite any authority for the application of its misplaced first-to-file argument here.

Because the Eastern District of Michigan is the only federal court in which any of the actions at issue are pending, the first-to-file doctrine provides no support for Everest's misguided attempt to dismiss the Petition in favor of the Everest Action.[3]

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[3] Other than *Smith v. McIver*, 22 U.S. 532 (1824), which predates the modern federal judiciary and considered the relationship between courts of law and courts of equity, all of the cases cited by Dart considered actions between different federal district courts. *See Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952) (considering actions between Northern District of Illinois and District of Delaware); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996) ("[A]s *between federal district courts*, one court should defer to the other . . . .") (emphasis added); *W. Gulf Mar. Ass'n v. ILA Deep Sea Local 24, S. Atl. & Gulf Coast Dist. of ILA, AFL-CIO*, 751 F.2d 721, 722 (5th Cir. 1985) (holding that Southern District of Texas should have transferred case to Southern District of New York); *Church of Scientology of California v. U.S. Dep't of Army*, 611 F.2d 738, 749 (9th Cir. 1979) (considering first-to-file doctrine between District of District of Columbia and Central District of California); *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 538 (6th Cir.

B. THE LETTER TO THE COURT WAS NOT SANCTIONABLE

Dart's demand that the Court sanction Prospect for raising certain administrative requests in a letter to the Court (copying all counsel for Respondents) is meritless. As a threshold matter, Dart does not identify the legal basis for its request. While Dart refers to Rule 11, sanctions are not available under that Rule because, among many other reasons, Dart did not serve its motion on Prospect 21 days before filing it. *See* Fed. R. Civ. P. 11(c)(2); *Penn, LLC v. Prosper Bus. Dev. Corp.*, 773 F.3d 764, 767 (6th Cir. 2014).

To the extent Dart's motion can be construed as requesting sanctions under the Court's inherent powers, "the imposition of inherent power sanctions requires a finding of bad faith . . . or conduct that is tantamount to bad faith." *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 517 (6th Cir. 2002) (citation omitted); *see also United States v. Llanez-Garcia*, 735 F.3d 483, 498 (6th Cir. 2013) (holding that district court abused its discretion by imposing inherent power sanctions in the absence of evidence of bad faith). The Court's "inherent

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1978) (referring to "the standards for restraining parallel litigation in *other federal district courts*") (emphasis added); *Meeropol v. Nizer*, 505 F.2d 232, 235 (2d Cir. 1974) ("Where an action is brought in *one federal district court* and a later action embracing the same issue is brought in *another federal court*, the first court has jurisdiction to enjoin the prosecution of the second action.") (emphasis added); *Barber-Greene Co. v. Blaw-Knox Co.*, 239 F.2d 774, 775–76 (6th Cir. 1957) (considering actions between the Northern District of Ohio and Northern District of Illinois.).

powers must be exercised with restraint and discretion" and sanctions "should be reserved for those cases in which the conduct of a party or an attorney is egregious and no other basis for sanctions exists." *First Bank of Marietta*, 307 F.3d at 516. (citations omitted). Such sanctions may be appropriate where, for example, "a court finds that fraud has been practiced upon it, or that the very temple of justice has been defiled." *Id.* at 512 (citations omitted).

Here, Dart has not shown that Prospect engaged in any misconduct—much less egregious and bad faith misconduct—by requesting administrative relief by letter addressed to the Court, copying all parties. Far from "abusive advocacy," Prospect's letter was an appropriate means of promoting judicial economy by informing Judge Drain, Judge Friedman and Judge Murphy of the existence of three related cases.[4] Dart fails to cite a single case or any other authority indicating that a letter to the Court requesting reassignment of duplicative, related actions to one judge is inappropriate. While Dart refers to Federal Rule of Civil Procedure 7(b)(1), nothing in that Rule prohibits letter requests addressed to the Court. *See*

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4 Dart's suggestion that sanctions are warranted based on its speculation that the Letter was drafted by "the Skadden firm from New York" is outrageous. (Motion to Dismiss and for Sanctions at 11.) Regardless of who drafted the Letter, Skadden represents Prospect along with Abbott Nicholson, and has applied for admission to the Court in advance of any appearance. Neither Skadden nor Abbott Nicholson has committed any misconduct in this case, and Skadden's location and admission status has absolutely no bearing on this issue.

U.S. Underwriters Ins. Co. v. United Pac. Assocs., LLC, No. 05-cv-1012 (JFB)(KAM), 2006 WL 2038507, at *2 (E.D.N.Y. July 19, 2006) ("Rule 7(b) of the Federal Rules of Civil Procedure does not require motions to be made by separate notice of motion, rather than in a letter or orally at a hearing or trial."), **Exhibit D**.

Prospect's decision not to file a more formal motion was based solely on the purely administrative and unique nature of its requests, which required the coordination of three Judges across three cases that had not yet been formally related. *See Pio v. Gen. Motors Co.*, No. 2:14-cv-11191, 2014 WL 2764120, at *2 (E.D. Mich. June 18, 2014) ("As [Local Rule 83.11(b)] plainly states, reassignment decisions lie within the *collective* discretion of the judges to whom the cases are assigned, and the Chief Judge with respect to the first provision. This alone precludes *this* Court from granting the pending motion [for judicial reassignment]."), **Exhibit E**. Even if Dart could show any technical deficiency in the format or procedures Prospect employed in raising its requests (which Dart has not shown), there is no dispute that Prospect acted in good faith solely for purposes of promoting efficiency and judicial economy—and without taking any position on which judge should preside over the coordinated actions—a far cry from the egregious and bad faith misconduct necessary to warrant sanctions under the Court's inherent powers.

In addition to being legally baseless, Dart's sanctions request is replete with blatant factual misrepresentations. Dart, for instance, represents that "the Panel in the underlying arbitration proceeding had to address similar behavior and direct Prospect to cease its letter writing campaign and to follow appropriate procedure for communication with the panel." (Motion to Dismiss and for Sanctions at 11.) In fact, after all parties—including Dart—corresponded with the Panel by email (which was entirely permissible at the time) the Panel ordered all parties—including Dart—not to initiate any further correspondence with the Panel except in certain limited circumstances. (*Id.*, Exs. 3–4.) Thus, Dart's assertion that the Panel "had to address similar behavior and direct Prospect to cease its letter writing campaign" is not just misleading, it is flatly untrue.[5]

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[5] Dart's wholly baseless attempt to suggest Prospect engaged in any misconduct in the underlying arbitration proceeding is highly disingenuous given that the Panel — including the arbitrator selected by Dart — unanimously found in the Award that Dart had engaged in very serious sanctionable conduct:

> There was no reasonable basis for the withholding of these critical documents under any realistic notion of attorney-client or work product privilege. Despite the Panel having repeatedly offered Dart an opportunity to provide a reasonable explanation for its conduct, Dart *and its counsel* did not offer a satisfactory justification for the conduct addressed in [a prior order]. . . . [T]he Panel finds Dart's conduct sufficient to justify the imposition of sanctions, including monetary sanctions . . . .

Award at 3–4 (emphasis added). The Dart "counsel" singled out for criticism in this passage is Dart's same counsel of record in the present proceeding of the Bodman Firm.

Similarly, Dart asserts that Prospect "misstated the underlying facts and procedure," but the only support provided is that "Prospect incorrectly implies . . . that this complaint was the first-filed action." (Motion to Dismiss and for Sanctions at 9 n.9.) Nowhere did Prospect state that the petition for confirmation was the first-filed action. Dart complains that Prospect referred to the date of removal (April 15) "instead of identifying the date that the state court case had been filed (April 11)," but Prospect in fact identified the date of filing on the very same page. (*See* Letter at 3 n.5) (referring to "the state court action Everest preemptively filed on April 11, 2016 to vacate the award").) Prospect fully disclosed the relevant facts, and Dart's allegations of misstatements are wholly unsupported and simply false.[6]

In fact, Dart's false representations to the Court violate both the Michigan Rules of Professional Conduct and the Federal Rules of Civil Procedure. The former Rules prohibit a lawyer from knowingly making a false statement of material fact or law to a tribunal, Mich. R. Prof. Conduct 3.3(a)(1), while the latter

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6 Dart also incorrectly asserts that Prospect's Letter requested "injunctive relief." (Motion to Dismiss and for Sanctions at 9.) Nowhere did the Letter request such relief. Rather, the Letter requested, for judicial efficiency and consistent with the request for an initial conference to coordinate all filed cases, a suspension of pending deadlines. (Letter at 5.)

require factual contentions to have evidentiary support, Fed. R. Civ. P. 11(b)(3). Dart's legally baseless and factually inaccurate sanctions request should be denied.

VI. CONCLUSION

For the reasons set forth above, Prospect respectfully requests that the Court deny the Motion to Dismiss and for Sanctions.

Dated: May 20, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2016, I electronically filed the foregoing *Petitioners' Response In Opposition To Dart Energy Corporation's Motion To Dismiss And For Sanctions and Brief in Support of Petitioners' Response In Opposition To Dart Energy Corporation's Motion To Dismiss And For Sanctions* with the Clerk of the Court using the ECF system which will send notification of such filing to the parties/attorneys of record.

Respectfully submitted,

Dated: May 20, 2016

ABBOTT NICHOLSON, P.C.

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